

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON

CHRISTYANNA KARPENSKI,

Plaintiff,

v.

AMERICAN GENERAL LIFE COMPANIES,
LLC, d/b/a AMERICAN GENERAL, d/b/a AG
BENEFIT SOLUTIONS CONNECTICUT
CLAIM CENTER; THE UNITED STATES LIFE
INSURANCE COMPANY IN THE CITY OF
NEW YORK, d/b/a US LIFE; and SEABURY &
SMITH, INC., d/b/a MARSH U.S. CONSUMER,
d/b/a MARSH AFFINITY GROUP SERVICES

Defendants.

Case No. C12-01569RSM

ORDER ON MOTIONS

THIS MATTER comes before the Court on Motion for Partial Summary Judgment by Plaintiff (Dkt. # 142), Motion for Summary Judgment by Defendants (Dkt. # 145), and Motion for Reconsideration by Plaintiff (Dkt. # 197). On February 14, 2014, the Court denied Plaintiff's claim to exclude her group disability insurance application from evidence and deferred the parties' breach of contract and rescission claims pending supplemental briefing on the application of Virginia law. Having considered the parties' supplemental briefs, oral argument, the remainder of the record, and applicable case law, and for the reasons that follow, the Court hereby denies Plaintiff's Motion for Reconsideration and denies summary judgment on the remaining issues pending before it.

Background

This matter arises out of the decision of Defendants American General Life Company ("American General") and The United States Life Insurance Company ("US Life") to rescind

1 the long term disability coverage of Plaintiff Christyanna Karpenski due to alleged
2 misrepresentations made by her on her Disability Insurance Application (“Application”). A
3 complete factual account of this matter is presented in the Court’s Order of February 14,
4 2014, denying in part Plaintiff’s Motion for Partial Summary Judgment. *See* Dkt. # 192, pp. 1-
5 5. The Court therein determined that the choice-of-law provision in the American Physical
6 Therapy Association (“APTA”) Master Policy, under which Plaintiff procured coverage,
7 selecting Virginia law as the governing law was valid and enforceable. The Court also denied
8 Plaintiff’s claim to preclude Defendants from introducing her Application into evidence
9 because of Defendant US Life’s failure to attach it to her Certificate of Insurance in her
10 Welcome Packet.

11 As the parties had only briefed the application of Virginia law to the attachment claim
12 raised by Plaintiff’s partial summary judgment motion, the Court directed the parties to file
13 further supplemental briefs on the application of Virginia law to the remaining contractual
14 claims for rescission, violation of the Application’s good health provision, and breach of
15 contract. *Id.* at pp. 25-26. In denying Plaintiff’s subsequent motion to stay briefing pending a
16 motion for reconsideration, the Court clarified its previous Order by permitting the parties to
17 additionally address whether Virginia and Washington law conflict with regards to the
18 remaining claims. *See* Dkt. # 194, p. 2. Remaining before the Court are Plaintiff’s claims in its
19 Motion for Partial Summary Judgment that Defendants are precluded from rescinding her
20 insurance coverage because they had no evidence of intent to deceive and for breach of
21 contract. *See* Dkt. # 142. Also remaining are Defendants’ claims in its Motion for Summary
22 Judgment for rescission under RCW 48.18.090 and due to Plaintiff’s failure to satisfy the
23 “good health” provision in her Application. *See* Dkt. # 145.

24 On February 28, 2014, Plaintiff filed a Motion for Reconsideration, moving the Court
25 to reconsider its Order of February 14, 2014 based on its application of Virginia law to the
26 contractual claims presented in this case. Specifically, Plaintiff contends that: (1) the Court
already ruled that Washington rescission law is the law of the case, (2) it is manifest error to
apply Virginia law to any or all claims, and (3) the Court manifestly erred in not ruling on the
applicability of RCW 48.18.080. This Order considers Plaintiff’s Motion for Reconsideration,

the remaining issues raised in the parties' motions for summary judgment, and Plaintiff's Motion to Strike evidence introduced by Defendants in their supplemental brief (Dkt. # 201).

Analysis

a) Motion for Reconsideration

Motions for reconsideration are disfavored and will be denied "in the absence of a showing of manifest error in the prior ruling or a showing of new facts or legal authority which could not have been brought to [the Court's] attention earlier with reasonable diligence." Local Rule CR 7(h)(1). Where summary judgment has been entered, "'after thoughts' or 'shifting of ground' are not an appropriate basis for reconsideration." *Fay corp. v. Bat Holdings I, Inc.*, 651 F.Supp. 307, 309 (W.D. Wash. 1987). Motions for reconsideration are not a vehicle for a litigant to attempt a second bite at the apple by raising facts or arguments available to him or her prior to the entry of summary judgment. *See Rosenfeld v. U.S. Department of Justice*, 57 F.3d 803, 811 (9th Cir. 1995)(holding that the district court did not abuse its discretion in declining to consider an argument "raised for the first time on reconsideration without a good excuse"); *Hopkins v. Anaya*, 958 F.2d 881, 887 n. 5 (9th Cir. 1992) ("A defeated litigant cannot set aside judgment because he failed to present on a motion for summary judgment all the facts known to him that might have been useful to the court.").

Because the Court fails to identify any manifest error in its Order, the Court denies Plaintiff's Motion for Reconsideration. First, Plaintiff contradicts herself in arguing that the Court erred in addressing the applicability of Virginia law as it previously applied Washington law in its Order on bifurcation (Dkt. # 41). As Plaintiff herself points out, Washington follows the rule of depechage, whereby "different issues in a single case arising out of a common nucleus of facts may be decided according to the substantive law of different states." *FutureSelect Portfolio Mgmt., Inc. v. Tremont Group Holdings, Inc.*, 175 Wash.App. 840, 856 n. 15, 309 P.3d 555 (2013). Moreover, the issue of choice of law was not before the Court when it considered Defendants' motion for bifurcation. To the extent that Plaintiff argues that Defendants waived their right to argue for the enforceability of the choice-of-law provision in Plaintiff's insurance contract, such an argument is unavailing. A party to a

1 contract may impliedly waive a contract provision meant for its benefit through “unequivocal
2 acts of conduct evidencing an intent to waive.” *Coastal Const. Group, Inc. v. Stellar J Corp.*,
3 164 Wash.App. 1032, *7 (2011)(citing *Mike M. Johnson, Inc. v. Spokane County*, 150 Wn.2d
4 375, 386, 78 P.3d 161 (2003)). It is undisputed that no conflict of law issue had previously
5 arisen, and thus there had been no opportunity for Defendants to waive Virginia law.
6 Accordingly, Defendants’ prior failure to assert Virginia law was not an unequivocal act
7 evidencing their intent to waive the contractual choice of Virginia law. *See Id.*

8 Plaintiff further argues that the Court erred by misclassifying Plaintiff’s insurance as
9 “true group insurance.” Despite characterizing her insurance policy as “group insurance”
10 throughout litigation, Plaintiff now for the first time attempts to characterize it as a “franchise
11 policy.” Relying on dicta in *Erickson v. Sentry Life Ins. Co.*, 43 Wn. App. 651, 655 n.1, 719
12 P.2d 160 (1986), Plaintiff argues that her policy would then garner the choice-of-law
13 treatment accorded to individual insurance policies. The Court declines to reconsider its
14 treatment of Plaintiff’s policy in light of her manifold admissions of group policy status,
15 including in her answer to Defendants’ counterclaim and at least 17 times throughout her
16 pleadings, which are binding *in judicio*. *See* Dkt. # 13, ¶ 4; Dkt. 195, Ex. 1 (citing numerous
17 instances in which Plaintiff characterized her policy as “group disability insurance” and
18 argued for its legal treatment as such). *See also, Gibbs Ex Rel. Estate of Gibbs v. CIHNA*
19 *Corp.*, 440 F.3d 571, 578 (2d Cir. 2006)(“Facts admitted in an answer, as in any pleading, are
20 judicial admissions that bind the [party] throughout this litigation.”). Plaintiff’s brazen attempt
21 to shift grounds in her characterization of her policy will not be entertained where the facts
22 and arguments she now belatedly puts forward were clearly available to her prior to the
23 Court’s Order on summary judgment.

24 As to the additional contractual claims before the Court, the Court hereby clarifies that
25 it proceeds under Washington choice-of-law analysis in making a separate determination of
26 the applicable law governing each claim. The Court’s solicitation of supplemental briefing by
the parties on the results under Virginia law was necessary to make a proper choice-of-law
determination. As the parties had neglected to brief the results of rescission, breach of
contract, and good health provision claims under Virginia law, the Court was not previously
in a position to make the required determination as to whether an actual conflict existed

1 between the local law of Washington and the contractually chosen Virginia law. *See Seizer*,
 2 132 Wash.2d at 648, 940 P.2d 261 (internal citation omitted)(“When parties dispute choice of
 3 law, there must be an actual conflict between the laws or interest of Washington and the laws
 4 or interests of another state before Washington courts will engage in a conflict of laws
 5 analysis.”). Indeed, the Court made its approach explicit in directing the parties to include in
 6 their supplemental briefs analysis of whether Virginia or Washington law controls on each
 pending claim. *See* Dkt. # 194.

7 Finally, Plaintiff’s position that the Court erred in not ruling on whether RCW
 8 48.18.080 governs her attachment claim is clearly incorrect. The Court directly addressed the
 9 applicability of RCW 48.18.080 in its Order and adopted a position that Plaintiff herself had
 10 put forward in determining that RCW 48.21.060 governs attachment for group disability
 11 applications. *See* Dkt. # 192 at pp. 18-19; Dkt. # 190 (“RCW 48.21.060 governs that [sic]
 12 admissibility of an insurance application for group disability insurance.”). Plaintiff has failed
 13 to identify any manifest error in the Court’s decision that RCW 48.21.060, rather than RCW
 48.18.080, governed her attachment claim under Washington law.

14 **b) Motion to Strike**

15 In reply (Dkt. # 201), Plaintiff moves the Court to strike new evidence attached to and
 16 discussed in Defendants’ Supplemental Brief. Dkt. # 195, p. 16:15-17; Dkt. # 196. Federal
 17 Rule of Civil Procedure 26(a)(1)(A) requires parties to disclose a copy or description of all
 18 documents and tangible things that the party has in its possession, custody or control and may
 19 use to support its claims or defenses. Initial disclosures must be made within 14 days of the
 20 parties’ Rule 26(f) conference or timely supplemented pursuant to Rule 26(e). “If a party fails
 21 to provide information or identify a witness as required by Rule 26(a) or (e), the party is not
 22 allowed to use that information or witness to supply evidence on a motion, at a hearing, or at
 23 trial, unless the failure was substantially justified or harmless.” Fed. R. Civ. P. 37(c)(1).
 District courts have wide latitude to impose discovery sanctions pursuant to Rule 37(c)(1).
Yeti by Molly, Ltd. v. Deckers Outdoor Corp., 259 F.3d 1101, 1106 (9th Cir. 2001).

1 There is no dispute that Defendants neither produced the contested evidence through
 2 their initial disclosures, timely supplements, or in response to Fed. R. Civ. P. 34 document
 3 requests by Plaintiff. Rather, Defendants waited until after the discovery deadline and relevant
 4 dispositive motions deadline were past and dispositive briefs were filed to include the material
 5 for the first time with a Court-ordered supplemental brief. *See* Scheduling Order, Dkt. # 72.
 6 To permit consideration of the evidence at this stage in summary judgment would unfairly
 7 prejudice Plaintiff, who has fully briefed both pending dispositive motions and lacks any
 8 opportunity to respond to Defendants' late-submitted evidence prior to the Court's ruling.
 9 Given the completion of briefing, Defendants' multiple supplements to Rule 26(a) disclosures
 10 and in response to Rule 34 discovery requests in which this disclosure was not included, and
 11 as the evidence is outside the ambit of the Court's Order requesting supplemental briefing on
 12 Virginia law, the untimely disclosure cannot be substantially justified or harmless with respect
 13 to the pending summary judgment motions. *See National Union Fire Ins. Co. v. Greenwich*
 14 *Ins. Co.*, 2009 WL 272895, *3 (W.D. Wash. 2009)(striking late-disclosed expert report and
 15 declining to consider it in ruling on summary judgment). Accordingly, the evidence and
 16 discussion of it in Defendants' Supplemental Brief is STRICKEN and shall not be considered
 17 by the Court in ruling on the pending motions for summary judgment.

18 **c) Summary Judgment Standard**

19 Summary judgment shall be granted where "the movant shows that there is no genuine
 20 dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed.
 21 R. Civ. P. 56(a). *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). In determining
 22 whether an issue of material fact exists, the Court views all evidence in the light most
 23 favorable to the non-moving party and draws all reasonable inferences in that party's favor.
 24 *Id.* at 248-50; *Matsushita Elect. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).
 25 A genuine issue of material fact exists "if the evidence is such that a reasonable jury could
 26 return a verdict for the nonmoving party." *Anderson*, 477 U.S. at 248. The moving party bears
 the initial burden of establishing the absence of a genuine issue of material fact. *Celotex Corp.*
v. Catrett, 477 U.S. 317, 322 (1986). Once the moving party meets this burden, the
 nonmoving party must produce "enough evidence to create a genuine issue of material fact"
 for trial. *Nissan Fire & Marine Ins. Co., Ltd. v. Fritz Companies, Inc.*, 210 F.3d 1099, 1102

(9th Cir. 2000). By contrast, the moving party is entitled to summary judgment as a matter of law if the nonmoving party fails to make “a sufficient showing on an essential element of her case with respect to which she has the burden of proof at trial.” *Celotex*, 477 U.S. at 322.

d) Rescission

Defendants move for summary judgment on the rescission counterclaim and affirmative defense on the grounds that Plaintiff made material misrepresentations on her Disability Insurance Application. Plaintiff also moves for summary judgment on rescission on the grounds that intent to deceive is a necessary element of rescission under Washington law and that Defendants had no evidence of intent to deceive when they determined to rescind Plaintiff’s policy. The parties dispute whether Virginia or Washington law governs Defendants’ rescission counterclaim.

1) Choice of Law

As an initial matter, the Court must determine the state law applicable to this claim. This Court, sitting in diversity, applies the choice-of-law rules of Washington. *See Downing v. Abercrombie & Fitch*, 265 F.3d 994, 1005 (9th Cir. 2001). The threshold question in a Washington choice-of-law analysis is whether there is an actual conflict between the laws or interests of Washington and that of another state. *Erwin v. Cotter Health Centers*, 161 Wash.2d 676, 692, 167 P.3d 1112 (2007)(citing *Seizer v. Sessions*, 132 Wash.2d 642, 648, 940 P.2d 261 (1997)). A “real conflict” exists where the result of a particular issue would be different under the law of the two states. *Id.* Absent a “real conflict,” the court applies the “presumptive local law.” *Id.* *See also, Carrideo v. Dell, Inc.*, 706 F.Supp.2d 1122 (2010)(“Absent an actual conflict, Washington law applies.”).

If an actual conflict exists and the parties selected the governing law, Washington courts apply section 187 of the Restatement (Second) Conflict of Laws (1971) to determine whether the parties’ contractual choice-of-law provision is effective. Courts in Washington generally enforce choice-of-law provisions in contracts. *Schnall v. AT&T Wireless Services, Inc.* 171 Wash.2d 260, 259 P.3d 1291, 131-32(2011)(internal quotations and citations omitted). The Court disregards the contract provision and applies Washington law if three conditions are satisfied: (1) “if, without the provision, Washington law would apply”; (2) “if the chosen state’s law violates a fundamental public policy of Washington”; and (3) “if

1 Washington's interest in the determination of the issue materially outweighs the chosen
2 state's interest." *McKee v. AT&T Corp.*, 164 Wash.2d 372, 191 P.3d 845, 851 (2008). Choice-
3 of-law provisions in the group insurance context present special consideration with respect to
4 the first prong of this analysis. Unlike individual insurance policies, "[r]ights against the
5 insurer under a group policy are generally governed by the law of the state where the master
6 policy was delivered." *Erickson v. Sentry Life. Ins. Co.*, 43 Wash.App. 651, 719 P.2d 160,
7 162(1986). This rule recognizes that "it is desirable that each individual insured should enjoy
8 the same privileges and protection." Restatement (Second) Conflict of Laws § 192, comment
9 h (1971). *See Boseman v. Connecticut Gen. Life Ins. Co.*, 301 U.S. 196, 206,
10 (1937)(respecting choice-of-law provisions in group insurance contracts gives effect to the
11 "purpose of the parties to the contract that everywhere it shall have the same meaning and
12 give the same protection, and that inequalities and confusion liable to result from applications
13 of diverse state laws shall be avoided.").

12 With regards to Defendants' rescission counterclaim, the choice-of-law inquiry at this
13 stage of the pleadings stops at the threshold because no real conflict results under Virginia and
14 Washington law. Virginia's rescission statute, Va. Code Ann. § 38.2-309, provides in relevant
15 part:

15 No statement in an application or in any affidavit made before or after loss
16 under the policy shall bar a recovery under a policy of insurance unless it is
17 clearly provided that such answer or statement was material to the risk when
18 assumed and was untrue.

18 Thus under Virginia law, an insurer seeking to rescind a contract must establish two elements
19 by clear proof: (1) that the insured's representation was false, and (2) that the false
20 representation was material to the insured's determination to undertake the risk and issue the
21 policy. *Banner Life Ins. Co. v. Noel*, 861 F.Supp.2d 701, 707 (E.D. Va. 2012); *Commercial*
22 *Underwriters Ins. Co. v. Hunt & Calderone, P.C.*, 261 Va. 38, 540 S.E.2d 491, 493 (2001).

22 An additional requirement is triggered where, as here, the insurer asked the insured to aver
23 that the representations were true only to the best of her knowledge and belief. *See Parkerson*
24 *v. Federal Home Life. Ins. Co.*, 797 F.Supp. 1308, 1315 (E.D. Va. 1992); Dkt. ## 146 & 150
25 at Ex. 2. Under such circumstances, the insurer must further demonstrate by clear proof that
26

1 the insured's statements were knowingly false in order to obtain rescission. *Old Republic Life*.
 2 *Ins. Co. v. Bales*, 213 Va. 771, 195 S.E.2d 854, 856 (1973).

3 Rescission under Washington law is governed by RCW 48.18.090. The statute
 4 contains two subsections, the first pertaining to "oral and written misrepresentation[s]...made
 5 in the negotiation of an insurance contract," and the second to statements made in writing by
 6 the insured in an application for life or disability insurance. *See* RCW 48.18.090. Where the
 7 first or both sections are implicated, Washington law clearly requires that an insured may
 8 rescind a policy upon satisfying four factors: (1) the policyholder represented as truthful
 9 certain information during the negotiation of the insurance contract; (2) those representations
 10 were untruthful, or misrepresentations; (3) the misrepresentations were material; and (4) the
 11 misrepresentations were made with the intent to deceive. *See Cutter & Buck, Inc. v. Genesis*
Ins. Co., 306 F.Supp. 2d 988, 997 (W.D. Wash. 2004)(citing RCW 48.18.090(1) and
 discussing oral and written communications made in negotiation of insurance contract).

12 However, where only RCW 48.18.090(2) is implicated, "'actual intent to deceive'
 13 does not necessarily need to be established in order to rescind the insurance agreement."
 14 *Northwestern Mut. Life. Ins. Co. v. Koch*, 2009 WL 3346677 (W.D. Wash. 2009), *vacated in*
 15 *part on other grounds*, 2009 WL 3674526 (W.D. Wash. 2009), *aff'd* 424 Fed.Appx. 621 (9th
 16 Cir. 2011). *See also, Olson v. Bankers Life. Ins. Co. of Neb.*, 63 Wash.2d 547, 551, 388 P.2d
 136 (1964). RCW 48.18.090(2) provides:

17 In any application for life or disability insurance made in writing by the
 18 insured, all statements therein made by the insured shall, in the absence of
 19 fraud, be deemed representations and not warranties. The falsity of any such
 20 statement shall not bar the right to recovery under the contract *unless such*
false statement was made with actual intent to deceive or unless it materially
affected either the acceptance of the risk or the hazard assumed by the insurer.

21 (emphasis added). Rescission under subsection (2) requires first that a false statement be
 22 knowingly made on the part of the insured. *Northwestern Mut. Life. Ins. Co. v. Koch*, 2009
 23 WL 3346677 at *7 (citing *Oregon Nat. Life Ins. Co. v. Superior School Photo Service, Inc.*,
 24 462 F.2d 1235, 1236 (9th Cir. 1977) ("To establish such falsity requires a showing that the
 25 insured 'knowingly [made] ... false statements'"). Once false statements have been
 26 shown, the insurer seeking to rescind must establish that the false statements were made with

1 either (1) actual intent to deceive, or (2) that they materially affected either the acceptance of
 2 risk or the hazard assumed by the insurance company. *See, e.g., Olson*, 63 Wash. 2d at 551
 3 (affirming jury instruction based on showing of either intent to deceive or materiality);
 4 *Rowley v. USAA Life Ins. Co.*, 670 F.Supp.2d 1199, 1202 (W.D. Wash. 2009)(under RCW
 5 48.18.090(2), defendant “must demonstrate that Plaintiff: (1) made a false statement, (2) and
 6 that the statement (a) was made with an intent to deceive or (b) materially affected the
 7 acceptance of the risk or hazard [defendant] assumed.”); *Tison v. American Nat. Ins. Co.*, 163
 8 Wash. 522, 3 P.2d 998 (1931); *Oregon Nat. Life Ins. Co. v. Superior School Photo Service, Inc.*, 462 F.2d 1235, 1236 (9th Cir. 1972).

9 Proof that a material false statement was made knowingly raises the presumption that
 10 it was made with intent to deceive. *See Music v. United Ins. Co. of Am.*, 59 Wash.2d 765, 769,
 11 370 P.2d 603 (1962). To overcome this presumption, plaintiff must provide some credible
 12 evidence that the false representations were not made with intent to deceive. *See Kay v.*
 13 *Occidental Life. Ins. Co.*, 28 Wash.2d 300, 301, 183 P.2d 181 (1947). Washington, like
 14 Virginia, provides that a misrepresentation is material if it changes the nature of the risk such
 15 that the insurance carrier either would not have issued the policy or would have charged a
 16 higher premium had the truth been known. *See Cutter & Buck Inc.*, 306 F.Supp. 2d at 997;
 17 *Chitwood v. Prudential Ins. Co. of Am.*, 143 S.E. 2d 915, 919 (Va. 1965).

18 As US Life’s decision to insure Plaintiff was based solely on her written application,
 19 rescission in the instant case is governed under RCW 48.18.090(2). No oral or written
 20 negotiations took place that would trigger the additional requirements of RCW 48.18.090(1),
 21 and indeed could not have as Plaintiff received standardized insurance under APTA’s group
 22 disability Master Policy. Thus under Washington law, as under Virginia law, intent to deceive
 23 is not a necessary element of rescission, which can also be effected upon a showing of a
 24 knowing and material misrepresentation. As the parties have not shown that application of
 25 Washington and Virginia law would lead to a different outcome on rescission at this juncture,
 26 the Court applies Washington law to Defendants’ rescission counterclaim for the purpose of
 the pending summary judgment motions.

2) Scope of Misrepresentations

1 The parties dispute to what extent Plaintiff misrepresented information on her
 2 Disability Application. Defendants contend that Plaintiff made wide-ranging
 3 misrepresentations in response to questions 2 and 3 of her Application, including through her
 4 failures to disclose neck and back pain, menstrual disorder, recurrent headaches, chronic
 5 fatigue, thyroid disorder, mental or emotional problems, and treatment and consultations with
 6 various physicians and clinics. Defendants also contend that Plaintiff misrepresented her
 7 polyp treatment on the Application and in response to a follow-up questionnaire. In response,
 8 Plaintiff contests that any misrepresentations were made and further moves the Court to
 9 preclude Defendants from invoking any allegations other than nondisclosure of joint and
 10 musculoskeletal disorders, which were the sole grounds for voiding coverage provided by
 11 American Life in its letter rescinding coverage. *See* Dkt. # 144, Ex. N (notifying Plaintiff that
 12 US Life was rescinding coverage on the basis of Plaintiff's omitted history of joint and
 musculoskeletal disorders, including her clinical reports of shoulder pain, low back pain,
 ligamentous laxity in pelvic and neck area, and lumbar spondylolisthesis).

13 Both Washington and Virginia recognize a common law doctrine known as "mend the
 14 hold," which precludes an insurer from changing the basis for avoiding liability after the onset
 15 of litigation. *See, e.g., White v. Bott*, 158 Va. 442, 454 (1931)(citing *Ohio & M.R. Co. v.*
 16 *McCarthy*, 96 U.S. 258, 267 (1877)); *Vision One, LLC v. Phila. Indem. Ins. Co.*, 174 Wn.2d
 17 501, 520, 276 P.3d 300 (2012)("A provision must be asserted as a basis for denying coverage,
 18 and during litigation insurers may be precluded from asserting new grounds for denying
 coverage."). The mend the hold doctrine has roots in the Supreme Court's decision in *Railway*
Co. v. McCarthy, in which the Court declared that:

19 Where a party gives a reason for his conduct and decision touching any thing
 20 involved in a controversy, he cannot, after litigation has begun, change his
 21 ground, and put his conduct upon another and a different consideration. He is
 22 not permitted thus to mend his hold. He is estopped from doing it by a settled
 principle of law.

23 96 U.S. 258, 267 (1877). This doctrine has been extended in the insurance context in a
 24 number of states to prevent insurers from shifting the grounds for non-performance from the
 25 reasons stated in the insurer's declination letter. *See* Robert H. Sitkoff, "*Mend the Hold*" and
 26

1 *Erie: Why An Obscure Contracts Doctrine Should Control in Federal Diversity Cases*, 65 U.
2 Chi. L. Rev. 1059 (1998).

3 Under Washington law, the mend the hold doctrine may be invoked to preclude
4 insurers from introducing new or changed bases for denying insurance coverage once
5 litigation has begun. *See Ledcor Industries (USA) Inc. v. Virginia Sur. Co., Inc.*, 2012 WL
6 223904, at *2 (W.D. Wash. 2012)(precluding changed basis). To prevail under this form of
7 estoppel, the insured must demonstrate that she “either suffered prejudice or the insurer acted
8 in bad faith when the insurer failed to raise all its grounds for denial in its initial denial letter.”
9 *Hayden v. Mutual of Enumclaw Ins. Co.*, 141 Wash.2d 55, 63, 1 P.3d 1167 (2000). *See also*,
10 *Bosko v. Pitts & Still, Inc.*, 75 Wash.2d 856, 454 P.2d 229 (1969)(“[I]t is the general rule that
11 if an insurer denies liability under the policy for one reason, while having knowledge of other
12 grounds for denying liability, it is estopped from later raising the other grounds in an attempt
13 to escape liability, provided that the insured was prejudiced by the insurer’s failure to initially
14 raise the other grounds.”). “An insurer is charged with the knowledge which it would have
15 obtained had it pursued a reasonably diligent inquiry.” *Id.*

16 Application of the factors for mend the hold estoppel precludes Defendants from
17 changing their grounds for rescission from those that they stood on prior to the onset of
18 litigation. American General investigated Plaintiff’s claim for benefits from as early as June
19 2009 until issuing the denial letter nearly a year later. American General’s contestable review
20 took place over a span of at least six months, from the point that it received Plaintiff’s
21 Disability Claim Questionnaire about her medical and treatment history in November 2009.
22 *See* Dkt. # 144, Ex. G. As required under Washington law, American General then provided a
23 reasoned explanation for denying Plaintiff’s claim and rescinding her policy in its formal
24 denial letter issued on May 11, 2010. *See* WAC 284-30-330(13) (requiring insurer to “provide
25 a reasonable explanation of the basis in the insurance policy in relation to the facts or
26 applicable law for denial of a claim.”); RCW 48.30.105(5)(a). Had there been additional bases
for rescinding Plaintiff’s coverage, American General should have notified Plaintiff of them at
this stage, following its extensive period of review. Instead, Defendants failed to do so until
well after litigation began and they had answered Plaintiff’s complaint, formally asserting
them only upon summary judgment. *See, e.g.*, Dkt. # 10, p. 23, ¶¶ 7-10. Plaintiff is clearly

1 prejudiced by Defendants' shifting grounds in that she brought her complaint on the basis of
2 American General's denial letter and prepared her case with the understanding that her claim
3 was denied solely due to alleged failure to disclose joint or musculoskeletal disorders.

4 The Court disagrees with Defendants that their reservation of rights in their
5 declination letter was sufficient to preserve additional bases for rescission. Such a stance is
6 contrary to Washington statutory law, WAC 284-30-330(13), and has never been
7 acknowledged by either Washington or Virginia courts as a means to overcome estoppel. *C.f.*
8 *In re Aberdeen 100, Inc.*, 1995 Bankr LEXIS 1032, *11 (D. Vt. 1995)(defendant insurance
9 company "waived nothing" because it had "specifically 'reserve(d) its rights to disclaim
10 coverage'" under additional grounds).

11 Accordingly, the Court considers first whether Plaintiff knowingly misrepresented her
12 history of joint and musculoskeletal disorders on her Application. Defendants contend that
13 Plaintiff knowingly misrepresented this history when she answered "No" under Question 2(b)
14 of her Application. Question 2(b) asked, "Have you ever had or been treated for...injury, pain
15 or disorder of the neck or back? Sciatica? Any disabling injury?" As evidence of
16 misrepresentation, Defendants point to numerous admissions regarding a history of neck and
17 back pain and related physical therapy that Plaintiff made in her deposition. When questioned
18 whether she knew when she filled out her Disability Application in February 2009 that she
19 had experienced muscular back pain, she responded, "I knew that I had experienced at some
20 point some muscular back pain, yes." Dkt. # 150, Ex. 1, pp. 139. Plaintiff further admitted
21 that she underwent 25 physical therapy sessions from November 13, 2007 to July 30, 2008,
22 for which she billed her health insurer. *Id.* at pp. 139, 163. Plaintiff admitted to disclosing a
23 history of back pain to her physical therapist, Caryn Pierce, in November 2007, though she
24 contested that the pain was the subject of her visit. *Id.* at p. 56. In her deposition, Pierce
25 corroborated that Plaintiff had been experiencing back pain and occasional neck pain at this
26 time, including while treating her patients. *Id.* at Ex. 4, pp. 69, 79. Pierce explained that
Plaintiff herself discovered in a techniques class that she was suffering "symptoms of a
somatic dysfunction, which is localized point tenderness and active tension held...in the
muscles even when she was at rest and that it prevented full mobility." *Id.* at p. 72.

1 Defendants further point to Plaintiff's clinical reports of neck and back pain and
2 disorder. Plaintiff, for instance, checked "yes" to experience of "back pain" since her previous
3 visit on a Return Patient Form when visiting her doctor on February 13, 2007. *Id.* at Ex. 3. In
4 February 2008, Plaintiff began seeing physical therapist Fawn Coussens for low back pain,
5 which she indicated on an Initial Evaluation Intake Form that she was experiencing more than
6 four times a day and which was severe enough to awaken her at night. *Id.* at Ex. 6, p. 44
7 (Plaintiff "was complaining of low back pain" when she presented for physical therapy on
8 February 6, 2008); Ex. 8. Plaintiff continued to treat for back pain with Ms. Coussens through
9 spring of 2008. *See Id.* at Ex. 6, p. 95. Plaintiff reported similar musculoskeletal pain to her
10 naturopath, Dr. Nina Paroo, in July 2008. She also informed Dr. Paroo that she had
11 spondyliolisthesis, or displacement of a vertebrae. *Id.* at Ex. 13, pp. 14-15, 23-24. Plaintiff
admitted to knowing of these physical therapy sessions in her "subconscious mind" when
filling out her Disability Application. *Id.* at Ex. 1, p. 241.

12 As an initial matter, the Court finds that Plaintiff averred to the truthfulness of the
13 statements in her Application. Her Application contained the following clause:

14 "To the best of my knowledge and belief, all statements I made above are true
15 and complete. I understand that my application for group insurance will be
accepted or declined on the basis of these statements."

16 Plaintiff's signature on the Application several lines below this clause satisfies the first *Cutter*
17 & *Buck* factor. *See Cutter & Buck*, 306 F.Supp.2d at 997; *Northwestern Mut. Life. Ins. Co.*,
18 2009 WL 3346677 at *7. As to the untruthfulness of her answer to question 2(b), Plaintiff's
19 history of seeking out physical therapeutic treatment for neck and back pain, her own
20 acknowledgment of musculoskeletal disorder, and her indications of recurring pain to
21 multiple treatment providers (including a physician) establish through clear, cogent, and
22 convincing evidence that she misrepresented her history of neck and back pain or disorder.
23 Plaintiff has failed to introduce any evidence that contradicts this finding. Although Plaintiff
24 disclaims in her affidavit making misrepresentations to US Life, her conclusory testimony
25 alone is insufficient to raise a genuine issue of fact to defeat summary judgment. *See*
26 *Anheuser-Busch, Inc. v. Natural Beverage Distributors*, 60 F.3d 337, 345 (9th Cir. 1995).
Neither is her objection that she did not believe that she was being treated for any undisclosed

1 disorder. The Application unambiguously asks for disclosure of neck and back pain as well as
 2 disorder. Thus even accepting as true Plaintiff's belief that she did not have a neck or back
 3 disorder, she still fails to contradict the extensive evidence suggesting regular and persistent
 4 pain.

3) Intent to Deceive

5 Whether a misrepresentation is made with intent to deceive is a question of fact.
 6 *Wilburn v. Pioneer Mutual Life Ins. Co.*, 8 Wash.App. 616, 620, 508 P.2d 632 (1973).
 7 Nonetheless, where an "insured knowingly makes a false statement, courts will presume that
 8 the insured intended to deceive the insurance company." *Ki Sin Kim*, 153 Wash. App. 339,
 9 355, 223 P.3d 1180 (2009), *citing Kay v. Occidental Life Ins. Co.*, 28 Wash. App.2d 300, 183
 10 P.2d 181 (1947). The insured can overcome this presumption by establishing "an honest
 11 motive or an innocent intent." *Ki Sin Kim*, 153 Wash. App. at 355. The insured must introduce
 12 "credible evidence" rather than relying on a "bare assertion that she did not intend to deceive
 13 the insurance company." *Id.* A mere denial is not sufficient. *Am. Fidelity & Cas. Co. v.*
Backstrom, 47 Wash.2d 77, 84, 287 P.2d 124 (1955).

14 As discussed supra, Defendants have introduced clear, convincing, and credible
 15 evidence to establish that Plaintiff knowingly misrepresented her history of neck and back
 16 pain or disorder. Plaintiff contends that the ensuing presumption disappears in light of
 17 evidence of her innocent intent or honest motive. As evidence of her innocent intent, Plaintiff
 18 contends that: (1) she did not seek out disability insurance from US Life, (2) she did not apply
 19 for the maximum allowable benefits, (3) she freely signed all authorizations for release of
 20 information, (4) she fully cooperated during the claim investigation, (5) she openly informed
 21 American General of her physical therapy in response to a medical questionnaire, and (6) she
 22 was never diagnosed with any joint or musculoskeletal disorders. *See* Dkt. # 170, pp. 27-28.

23 Viewing the evidence in the light most favorable to the non-moving party, Plaintiff
 24 has introduced sufficient evidence of innocent intent such that a jury should determine this
 25 prong as a question of fact. The presumption of intent to deceive is not itself evidence but
 26 merely a presumption that shifts the burden of producing prima facie evidence of innocent
 intent to Plaintiff. *See Kay*, 28 Wash.2d at 303. Where there is "credible evidence from which
 a jury could conclude that the alleged misrepresentations...were made without 'intent to

1 deceive,” the presumption of intent disappears. *Music v. United Ins. Co. of America*, 59
 2 Wn.2d 765, 769 (1962). Such is the case here. In addition to the other indicia of innocent
 3 intent that she has introduced, the fact that Plaintiff never claimed benefits related to neck and
 4 back pain or disorder further rebuts dishonest motive. As does the fact that Plaintiff is a doctor
 5 of physical therapy herself and often participated in sessions as part of her training. As in a
 6 case where an applicant “could reasonably have believed that the misrepresented health
 7 condition was cured,” Plaintiff could have believed that her pain and physical therapeutic
 8 treatment did not rise to a level that would mandate reporting on her Application. *See Johnson*
 9 *Int’l Co. v. Jackson Nat’l Life Ins. Co.*, 19 F.3d 431, 435 (8th Cir. 1994). While Defendants
 10 have introduced evidence of knowing misrepresentations, they have not presented direct
 11 evidence that Plaintiff specifically intended to deceive US Life when filling out her insurance
 12 Application. Where there is no evidence establishing intent as a matter of law, intent to
 13 deceive is a jury question,” and summary judgment is not warranted as to Plaintiff’s intent to
 14 deceive. *Id.*

15 Plaintiff also argues that Defendants should be precluded from arguing intent to
 16 deceive as they failed to specifically raise Plaintiff’s intent as grounds for rescission prior to
 17 litigation. *See* Dkt. # 142, pp. 12-13. The Court disagrees. Plaintiff has not pointed to any case
 18 in which a Washington court required an insurance company to specifically cite to “intent to
 19 deceive” in its denial letter. The Court finds that Defendants sufficiently notified Plaintiff that
 20 they would argue this element when they informed her that they were rescinding her
 21 Application due to misrepresented history of joint and musculoskeletal disorders. Plaintiff
 22 consequently was not prejudiced by Defendants’ failure to specifically assert her intent to
 23 deceive. As it finds that Defendants are not estopped from asserting intent to deceive as
 24 grounds for rescinding coverage, the Court also denies Plaintiffs’ Motion for Partial Summary
 25 Judgment on this prong.

26 **4) Materiality**

As discussed supra, Defendants may still rescind Plaintiff’s coverage if they can
 establish through clear, cogent, and convincing evidence that Plaintiff’s misrepresentations
 were material. *Queen City Farms v. Cent. Nat’l Ins. Co. of Omaha*, 126 Wn.2d 50, 97 (1994).
 A representation made in conjunction with an insurance application is material if the

1 representation influenced the insurance company's decision to issue the coverage. *Id.* at 100;
2 *Cutter and Buck*, 306 F.Supp.2d at 1003.

3 The materiality of a misrepresentation is typically a question of fact. *Cutter and Buck*,
4 306 F.Supp.2d at 1003; *Olson v. Bankers Life Ins. Co.*, 63 Wash.2d 547, 552, 388 P.2d 136
5 (1964); *Allstate Insurance Co. v. Huston*, 123 Wn.App. 530, 539-40 (2004). Defendants,
6 however, rely on *Cutter & Buck* to argue for an exception to this general rule. For instances
7 where an insurer specifically asks for information in regard to a certain matter, Defendants
8 contend that Washington law provides a presumption that the matter is material. *See Cutter &*
9 *Buck*, 306 F.Supp.2d at 1003.

10 Defendants' reliance on *Cutter & Buck* is misplaced. The *Cutter & Buck* court was
11 interpreting a decision by a Washington Court of Appeals, which found that "when an insurer
12 asks no information in regard to a certain matter, it is a fair assumption that it regards the
13 matter as immaterial." *USLife Credit Ins. Co. v. McAfee*, 29 Wash.App. 574, 577, 630 P.2d
14 450 (1981). *Cutter & Buck* interpreted *USLife* to "impl[y]" that a similar presumption holds
15 when an insurer inquires into certain matters, specifically an insured's financial statements.
16 Significantly, the *Cutter & Buck* court's decision was bolstered by non-Washington cases that
17 addressed the materiality of an insured's financial statements for D&O insurance. *Cutter &*
18 *Buck* did not extend such a presumption to all questions, including the panoply of broadly
19 worded health history questions on Plaintiff's Application. The *USLife* court, in creating a
20 presumption of immateriality, was concerned with preventing precisely the "kind of post-
21 claim underwriting" allegedly at issue in the instant case, through which insurers use "20-20
22 vision of hindsight to seek out prior health problems in order to try and defeat" any claim
23 presented. *USLife Credit*, 29 Wn.App. at 581. Moreover, Plaintiff has rebutted any
24 presumption that would arise by producing evidence that US Life lacks underwriting
25 guidelines concerning musculoskeletal disorders and that US Life has issued policies to
26 APTA members who disclosed history of physical therapy treatment. Dkt. # 171, Ex. B (US
Life 30(b)(6) deponent "cannot recall" any underwriting guidelines concerning
musculoskeletal disorders); Dkt. # 199, Ex. Z, p. 3.

The touchstone of the materiality inquiry is whether the information in question
measures the risk that the insurer assumes. *Cutter & Buck*, 306 F.Supp. at 1003, citing *Verex*

1 *Assurance, Inc. v. John Hanson Savings and Loan, Inc.*, 816 F.2d 1296, 1302 (9th Cir. 1987).
 2 Unlike in *Cutter & Buck*, Defendants in the instant matter have not introduced evidence
 3 sufficient to establish as a matter of law that the allegedly omitted medical history, such as
 4 Plaintiff's sessions with a physical therapist for back pain, actually bear on the insurer's risk
 5 and consequent decision to issue coverage. Defendants rely entirely on conclusory statements,
 6 unsupported by specific facts, by underwriter Lydia Labinsky that coverage would have been
 7 declined but for each omission. *Compare* Labinsky Affidavit, Dkt. # 147 (testifying that US
 8 Life would not have issued disability coverage had it known the details of Plaintiff's physical
 9 therapy treatment) *with* Labinsky Deposition, Dkt. # 171, Ex. H, p. 86 (failing to recall ever
 10 declining to issue coverage to an APTA member because the applicant disclosed a history of
 11 physical therapy). Without documentation of US Life's medical underwriting practices or
 12 indeed any evidence of the bearing that it considers Plaintiff's undisclosed history to have on
 13 risk, Defendants fail to establish the absence of a material fact as to the materiality of the
 14 alleged misrepresentations. *See Carpinone v. Mut. of Omaha Ins. Co.*, 97 N.Y.S.2d 381, 382
 15 (1999)(explaining that for an insurer "to establish the materiality of a misrepresentation as a
 16 matter of law, it was required to present documentation concerning its underwriting practices
 17 such as underwriting manuals, rules or bulletins which pertain to insuring similar risks."). The
 18 possibility that Defendants are engaging in post-claim underwriting provides an additional
 19 reason to deny summary judgment. *See Rowley*, 670 F.Supp. 2d at 1206-7.

17 **e) Good Health Provision**

18 Defendants further argue that Plaintiff's change in insurability and health prior to the
 19 payment of her first premium voids coverage. Defendants rely on a "good health" provision of
 20 Plaintiff's Insurance Application, which states:

21 "Insurance will take effect only if the certificate is issued based on this
 22 application and the first premium is paid in full while there is no change in the
 23 insurability or health of such person from that stated in the application."

24 *See* Dkt. # 145, p. 26. Washington and Virginia courts have construed good health clauses in
 25 insurance applications as a condition precedent to recovery on the policy. *See Williams v.*
 26 *Metropolitan Life. Ins. Co.*, 10 Wash. App. 600, 603, 519 P.2d 1310 (1974); *Hamond v.*
Pacific Mut. Life Ins. Co., 159 F.Supp.2d 249, 254 (E.D. Va. 2001). As the parties have not

1 identified a real conflict on this issue, the Court applies Washington law.

2 As an independent ground for voiding coverage, Defendants were required to inform
 3 Plaintiff of their enforcement of the good health provision prior to litigation. As they failed to
 4 do so, they are not permitted to mend the hold and shift their grounds for rescission at this late
 5 stage. *See Vision One, LLC*, 174 Wn.2d at 520. Regardless, issues of material fact remain as
 6 to both the date on which Plaintiff's health materially changed and the date on which her
 7 premium was paid. *See* Dkt. # 168, ¶ 2; Karpenski Deposition, Dkt. # 171, Ex. 19, p. 193
 8 ("I'm not sure when [the first premium] was paid). As Plaintiff's Welcome Packet contained
 9 merely a secure pay authorization form rather than a billing statement, it does not substantiate
 10 the date of Plaintiff's first premium payment. *See* Dkt. # 143, Ex. A., p. 8. Summary judgment
 11 is accordingly denied on Defendants' good health clause claim.

12 **f) Breach of Contract**

13 As neither party identifies a conflict between Virginia and Washington law regarding
 14 breach of contract, the Court also analyzes this claim under Washington law. The elements of
 15 a breach of contract claim are: (1) the existence of a valid contract, (2) breach of that contract,
 16 and (3) damages resulting from the breach. *See Wells Fargo Bank N.A. v. Gerung*, 2013 WL
 17 6061592, *3 (W.D. Wash. 2013)(citing *Fid. & Deposit Co. of Maryland v. Dally*, 1487
 18 Wash.App. 739, 201 P.3d 1040, 1044 (2009)). Washington recognizes that a rescinded policy
 19 voids it *ab initio*. *See Russell v. Stephens*, 191 Wash. 314, 71 P.2d 30, 31 (1937) ("When a
 20 contract is legally rescinded, the parties are restored to their status quo generally...."). As the
 21 Court has denied summary judgment on Defendants' rescission claim, it cannot yet reach
 22 Plaintiff's breach of contract claim as a matter of law. Accordingly, summary judgment as to
 23 this claim is denied.

24 **Conclusion**

25 For the reasons stated herein, the Court hereby finds and ORDERS that:

- 26 (1) Plaintiff's Motion for Reconsideration (Dkt. # 197) is DENIED.
- (2) Plaintiff's Motion to Strike (Dkt. # 201) is GRANTED. The Court STRIKES new
 evidence at Dkt. # 196 and accompanying text at Dkt. # 195, p. 16:15-17.

- 1 (3) Defendants' Motion for Summary Judgment (Dkt. # 145) is DENIED as disputed
2 issues of material fact remain as to Plaintiff's intent to deceive and the materiality of
3 her misrepresentations as to her history of joint and musculoskeletal disorders.
4 Defendants' Motion is also DENIED with respect to Plaintiff's violation of her
5 Application's good health clause as Defendants are estopped from introducing this
6 new basis for rescission post-litigation.
7 (4) Plaintiff's Motion for Partial Summary Judgment (Dkt. # 142) is DENIED as to her
8 claim to preclude Defendants from arguing intent to deceive and DENIED as to her
9 claim for breach of contract.

10 Dated this 2nd day of April 2014.

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12 RICARDO S. MARTINEZ
13 UNITED STATES DISTRICT JUDGE
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